CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 835

STATE OF NEW YORK AND SARATOGA SPRINGS COMMISSION AND SARATOGA SPRINGS AUTHORITY, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1944.

CERTIORARI GRANTED JUNE 12, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 83

STATE OF NEW YORK AND SARATOGA SPRINGS COMMISSION AND SARATOGA SPRINGS AUTHORITY, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX.

	Original	Print
Record from D. C. U. S., Northern New York	1	1
Statement under Rule 13	1	1
Summons	2	2
Bill of complaint	3	2
Answer of defendant, State of New York	9	6
Answer of defendants, Saratoga Springs Commission and Saratoga Springs Authority	12	8
Stipulation of facts	15	9
Opinion, Bryant, J.	32	22
Decision	39	27
Findings of fact	39	27
Conclusions of law	40	27
Judgment	41	28
Amended judgment	42	29
Stipulation re judgment	44	30
Notice of appeal of State of New York	44	30
Notice of appeal of defendants, Commission and Authority	46	31

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 2, 1944.

—3200

Record from D. C. U. S., Northern New York—Continued

	Original	Print
Record from D. C. U. S., Northern New York—Continued		
Stipulation of record	47	32
Clerk's certificate (omitted in printing)	49	
Proceedings in U. S. C. C. A., Second Circuit	50	33
Opinion, Chase, J.	50	33
Judgment	56	37
Clerk's certificate (omitted in printing)	58	
Order granting certiorari	59	39

[fol. 1] **IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

STATE OF NEW YORK AND SARATOGA SPRINGS COMMISSION AND SARATOGA SPRINGS AUTHORITY, Defendants-Appellants.

STATEMENT UNDER RULE 13

This action was commenced by the service of Summons and Bill of Complaint on or about March 23, 1938.

Issue was joined by the service of the answer of the State of New York on or about the 11th day of April, 1938, and the answer of the defendants Saratoga Spring Commission and Saratoga Springs Authority on or about April 13, 1938.

Trial was had on a stipulated statement of facts before District Judge Frederick H. Bryant without a jury on the 2nd day of April, 1942, and resulted in a decision in favor of the plaintiff against the defendants, dated May 10, 1943.

Judgment was entered May 12, 1943, and an amended judgment was entered June 3, 1943.

Appeals were taken by all of the defendants August 5, 1943.

[fol. 2] Plaintiff originally appeared by Hon. Ralph L. Emmons, United States Attorney, and now appears by Hon. Irving J. Higbee, United States Attorney.

The defendant State of New York originally appeared by Hon. John J. Bennett, Attorney General, and now appears by Hon. Nathaniel L. Goldstein, Attorney General.

The defendants Saratoga Springs Commission and Saratoga Springs Authority originally appeared by Hon. Spencer B. Eddy and now appear by Hon. Denis J. Harrington.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

No. Law 2503

UNITED STATES OF AMERICA, Plaintiff,

against

STATE OF NEW YORK, AND SARATOGA SPRINGS COMMISSION, AND SARATOGA SPRINGS AUTHORITY, Defendants.

SUMMONS

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be [fol. 3] taken against you by default for the relief demanded in the complaint.

Witness, The Honorable Frank Cooper, United States District Judge, at the City of Utica, in the Northern District of New York, this 23rd day of March, in the year of our Lord, one thousand nine hundred and thirty-eight.

G. A. Porter, Clerk. (Seal.)

Ralph L. Emmons,
Plaintiff Attorney,
Office and Post Office Address,
U. S. Attorney,
Binghamton, New York.

IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT

The plaintiff, United States of America, by its attorney, Ralph L. Emmons, United States Attorney in and for the Northern District of New York, for its complaint herein alleges as follows:

1. That at all the times hereinafter mentioned plaintiff has been and now is a corporation sovereign and body politic.

2. That the defendant, State of New York, is a corporation sovereign and body politic, engaged in the business of bottling for sale and selling in closed containers natural and artificial mineral and table waters at a price in excess of 12½ cents per gallon with its principal place of business in the County of Saratoga, State of New York, within the [fol. 4] jurisdiction of this Court, and was so engaged at the times hereinafter mentioned.

3. That the defendant, Saratoga Springs Commission, is a body corporate, organized, created, and existing under and by virtue of the laws of the State of New York and is engaged in the business of bottling for sale and selling in closed containers natural and artificial mineral and table waters at price in excess of 12½ cents per gallon with its principal office and place of business in the County of Saratoga in the State of New York, within the jurisdiction of this Court, and was so organized, created, and existing and so engaged at the times hereinafter mentioned.

4. That the defendant, Saratoga Springs Authority, is a body corporate, organized, created, and existing under and by virtue of the laws of the State of New York and is engaged in the business of bottling for sale and selling in closed containers natural and artificial mineral and table waters at a price in excess of 12½ cents per gallon with its principal office and place of business in the County of Saratoga, State of New York, within the jurisdiction of this Court, and was so organized, created and existing and so engaged at the times hereinafter mentioned.

5. That the plaintiff is in doubt as to which of the said defendants is liable to it in the premises and therefore joins all as parties to this action to the end that their several liability or liabilities may be determined.

6. That this is an action at law by the United States of a civil nature arising in connection with the administration of the laws of Congress providing for internal revenue and its institution is authorized and directed by the [fol. 5] Attorney General of the United States at the request of the Commissioner of Internal Revenue.

7. That returns disclosing the amount of tax due, if payable, on the bottling for sale and sale in closed containers of natural and artificial mineral and table waters by the

defendants during the period from June 21, 1932, to May 10, 1934, inclusive, were filed by defendants, under protest, with the Collector of Internal Revenue at Albany, New York. Photostat copies of said returns, together with statements attached thereto, respectively, are attached hereto and made a part hereof as Plaintiff's Exhibits A-1 to A-24, inclusive.

8. That the taxes in the amounts disclosed by said returns as due, if payable, filed as alleged, for each of the months from June 21, 1932, to May 10, 1934, inclusive, together with penalties and interest were assessed in the following amounts, on the following assessment lists and notices and demands were issued for payment of the said assessments on the following dates:

Year Month	Amount	Assessment List	Date of Demand
June 1932	Tax $60.87	Sept. 32 P. 770 L. O.	12/14/32
July 1932	Tax 295.04	Sept. 32 P. 770 L. I.	12/14/32
Aug. 1932	Tax 328.02	Sept. 32 P. 770 L. 2	12/14/32
Sept. 1932	Tax 193.18	Oct. 32 P. 2154 L. O.	12/14/32
	Int. 1.67	P. 2157 L. 5	12/14/32
Oct. 1932	Tax 233.28	Nov. 32 P. 2132 L. O.	12/15/32
Nov. 1932	Tax 176.42	Dec. 32 P. 2132 L. I.	1/18/33
Dec. 1932	Tax 140.23	Jan. 32 P. 2162 L. I.	2/10/33
	Int. 1.87	P. 2174 L. 2	2/10/33
Jan. 1933	Tax 176.06	Feb. 33 P. 2124—A L. O.	2/20/33
	Int. 1.76	P. 2129 L. 3	2/20/33
[fol. 6]			
Feb. 1933	Tax 58.48	Mar. 33 P. 2160 L. O.	4/24/33
	Int. .48	P. 2165 L. I.	4/24/33
Mar. 1933	Ta 136.85	Apr. 33 P. 2106—A. L. O.	6/1/33
	Int. 1.83	P. 2112 L. 7	6/1/33
Apr. 1933	Tax 169.07	May 33 P. 2128—A L. I.	6/13/33
	Int. 2.25	P. 2133 L. 8	6/13/38
May 1933	Tax 169.07	Jun. 33 P. 2123—A L. O.	1/3/37
	Pen. 42.26		
	Int. 3.38	P. 2132 L. 8	1/3/37
June 1933	Tax 149.31	July 33 P. 2132—A L. O.	1/3/37
	Int. 1.02	P. 2138 L. 8	1/3/37
July 1933	Tax 240.79	Aug. 33 P. 2135 L. O.	1/3/37
	Int. 3.21	P. 2142 L. 6	1/3/37
Aug. 1933	Tax 310.39	Sept. 33 P. 2117—A L. 5	1/3/37
	Int. 2.58	P. 2124 L. 4	1/3/37
Sept. 1933	Tax 287.78	Nov. 33 P. 2093 L. O.	1/3/37
	Int. 5.37	P. 2098 L. 9	1/3/37
Oct. 1933	Tax 155.46	Dec. 33 P. 2049—A L. O.	1/3/37
	Pen. 38.86		
	Int. 3.41	P. 2092 L. 7	1/3/37
Nov. 1933	Tax 245.01	Dec. 33 P. 2049—A L. I.	1/3/37
	Int. 3.26	P. 2092 L. 8	1/3/37
Dec. 1933	Tax 106.97	Jan. 34 P. 2110 L. O.	1/3/37
	Int. .83	P. 2116 L. 3	1/3/37
Jan. 1934	Tax 102.85	Mar. 34 Sp. P. 2000 L. 8	1/3/37
	Pen. 25.71		
	Int. 1.36		

Year Month	Amount	Assessment List	Date of Demand
Feb. 1934	Tax 57.28 Int. .19	Mar. 34 Sp. P. 2000 L. 7	1/3/37
Mar. 1934	Tax 150.42 Int. .50	Apr. 34 Sp. P. 2000 L. O.	1/3/37
Apr. 1934	Tax. 261.14 Int. 3.48	Jun. 34 Sp. P. 2000 L. O.	1/3/37
May 1934	Tax 124.34 Int. .41	Jun. 34 Sp. P. 2000 L. O.	1/3/37

[fol. 7] The assessments for each of the months from June, 1932, to September, 1933, inclusive, were made in the name of the defendant, Saratoga Springs Commission, and the assessments for each of the months from October, 1933, to May, 1934, inclusive, were made in the name of the defendant, Saratoga Springs Authority.

No part of said taxes, penalties, and interest assessed and demanded as aforesaid have been paid.

9. That by reason of the failure of the said defendants or any of them to pay any part of the said taxes, penalties, and interest assessed and demanded, as aforesaid, and after allowing all just credits and set-offs, there is now due and owing from the said defendants or from such of them as the Court may decide is or are liable to the plaintiff the said taxes, penalties, and interest in the following sums, together with interest at the lawful rate on said sums from the following dates, respectively:

On the sum of $878.28 with interest from December 14, 1932,

On the sum of $233.28 with interest from December 15, 1932,

On the sum of $176.42 with interest from January 18, 1933,

On the sum of $142.10 with interest from February 10, 1933,

On the sum of $177.82 with interest from February 20, 1933,

On the sum of $58.96 with interest from April 24, 1933,

On the sum of $138.68 with interest from June 1, 1933,

On the sum of $171.32 with interest from June 13, 1938,

On the sum of $2,496.64 with interest from January 3, 1937.

[fol. 8] Wherefore, plaintiff demands judgment against the defendants or against such of them as the Court may decide is or are liable to the plaintiff in the premises, for the said sums with interest at the lawful rate thereon, from the said dates, respectively, as set out hereinabove in paragraph 9 of this complaint, and the costs and disbursements of this action.

——— ———, United States Attorney.

Duly sworn to by Ralph L. Emmons. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT, STATE OF NEW YORK

The defendant State of New York, by John J. Bennett, Jr., its Attorney-General, answering the bill of complaint herein,

1. Denies each and all of the allegations contained in the paragraphs thereof numbered 2, 3 and 4 except that it admits that the defendant State of New York is a corporation sovereign and body politic, admits that the defendant Saratoga Springs Authority is a public benefit corporation created and existing under and by virtue of the laws of the State of New York, and admits that the defendant State of New York, by its agencies the Saratoga Springs Commission and Saratoga Springs Authority, did bottle for sale and sell in closed containers certain natural mineral waters at a price in excess of 12½ cents per gallon within the jurisdiction of this Court during the times alleged in said bill of complaint.

2. Admits the allegations contained in the paragraph of said bill of complaint numbered 7 except that it denies that any of the waters therein mentioned were artificial.

[fol. 10]. 3. Admits the allegation contained in the paragraph of said bill of complaint numbered 8 except that it denies that any of the assessments therein described were legally made.

4. Denies each and all of the allegations contained in the paragraph of said bill of complaint numbered 9.

The said defendant, further answering the said bill of complaint, as and for a first defense thereto, alleges that all of the waters in said bill of complaint mentioned were natural mineral waters taken from springs located upon the State reservation at Saratoga Springs, in the State of New York; that at all of the times in said bill of complaint mentioned the defendant State of New York was, and now is, the owner of the said reservation and springs and was, and now is, maintaining the same as a State health resort and spa for use by the public for balneological, therapeutic and other similar healthful purposes; that the said waters possess medicinal properties that are beneficial in the treatment of disease and are widely prescribed by physicians for that purpose; that the waters so sold were excess waters not required for use upon said reservation and were sold in their natural state; that their sale was merely incidental to the maintenance and operation of the said reservation; that all of the proceeds thereof were expended for the development and maintenance of the said reservation as a public health resort; that in the bottling and sale of the said waters the defendant State of New York was engaged in the exercise of a usual, traditional and essential governmental function; that the said waters, and their bottling and sale by the defendant State of New York, were and are immune from taxation by the plaintiff, and that the purported assessments described in said bill of complaint are invalid under [fol. 11] the Constitution of the United States and are illegal, null and void.

Wherefore, this defendant demands judgment against the plaintiff dismissing its bill of complaint, with costs.

John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for Defendant State of New York, Office and Post Office Address, The Capitol, Albany, N. Y.

Duly sworn to by Wendell P. Brown. Jurat omitted in printing.

[fol. 12] In United States District Court

Answer of Defendants, Saratoga Springs Commission and Saratoga Springs Authority

The defendants Saratoga Springs Commission and Saratoga Springs Authority, by Spencer B. Eddy, their attorney, answering the bill of complaint herein,

1st. Deny each and all of the allegations contained in the paragraphs numbered 2, 3 and 4, except that they admit that the defendant State of New York is a corporation sovereign and body politic, admit that the defendant Saratoga Springs Authority is a public benefit corporation created and existing under and by virtue of the laws of the State of New York, and admit that the defendant State of New York, by its agencies the Saratoga Springs Commission and Saratoga Springs Authority, did bottle for sale and sell in closed containers certain natural mineral waters at a price in excess of 12½ cents per gallon within the jurisdiction of this Court during the times alleged in said bill of complaint.

[fol. 13] 2nd. Admit the allegations contained in the paragraph of said bill of complaint numbered 7, except that they deny that any of the waters therein mentioned were artificial.

3rd. Admit the allegations contained in the paragraph of said bill of complaint numbered 8, except that they deny that any of the assessments therein described were legally made.

4th. Deny each and all of the allegations contained in the paragraph of said bill of complaint numbered 9.

The said defendants, further answering the said bill of complaint, as and for a first defense thereto, allege that all of the waters in said bill of complaint mentioned were natural mineral waters taken from springs located upon the State reservation at Saratoga Springs, in the State of New York; that at all of the times in said bill of complaint mentioned the defendant State of New York was, and now is, the owner of the said reservation and springs and was, and now is, maintaining the same as a State health resort and spa for use by the public for balneological, therapeutic and other similar healthful purposes; that the said waters pos-

sess medicinal properties that are beneficial in the treatment of disease and are widely prescribed by physicians for that purpose; that the waters so sold were excess waters not required for use upon said reservation and were sold in their natural state; that their sale was merely incidental to the maintenance and operation of the said reservation; that all of the proceeds thereof were expended for the development and maintenance of the said reservation as a public health resort; that in the bottling and sale of the said waters the defendant State of New York was engaged in the exer- [fol. 14] cise of a usual, traditional and essential governmental function; that the said waters, and their bottling and sale by the defendant State of New York, were and are immune from taxation by the plaintiff, and that the purported assessments described in said bill of complaint are invalid under the Constitution of the United States, and are illegal, null and void.

Wherefore, these defendants demand judgment against the plaintiff dismissing its bill of complaint, with costs.

Spencer B. Eddy, Attorney for Defendants, Saratoga Springs Commission and Saratoga Springs Authority, City Hall, Saratoga Springs, N. Y.

Duly sworn to by Cyrus B. Elmore. Jurat omitted in printing.

[fol. 15] IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS

The plaintiff and the defendants herein, by their attorneys, hereby stipulate and agree that for the purposes of trial the following facts may be taken as true, subject to the right of any of the parties to object to the relevancy or materiality of the same and to introduce other and further facts not inconsistent with the facts so stipulated:

1. This is a suit by the United States, authorized and directed by the Attorney General, at the request of the Commissioner of Internal Revenue, to recover taxes, interest, and penalties assessed on the bottling for sale and sale in [fol. 16] closed containers of natural, mineral waters and table waters at a price in excess of 12½ cents per gallon by

the defendants during the period June 21, 1932, to May 10, 1934, inclusive.

2. The plaintiff and the defendant State of New York are corporations sovereign and bodies politic.

3. The defendant Saratoga Springs Commission is and at all times mentioned in the complaint was a public commission of the defendant State of New York with its powers, duties and purposes prescribed by the laws of the State of New York. The Saratoga Springs Commission, as hereinafter more fully set forth, was created by Chapter 866 of the Laws of 1930, as a temporary commission for the term of seven years, and was contained as a permanent commmission in the State Conservation Department by Chapter 279 of the Laws of 1937.

4. The defendant Saratoga Springs Authority is, and since April 18, 1933, has been a body corporate and politic constituting a public benefit corporation of defendant State of New York, with its powers, duties and purposes prescribed by the laws of the State of New York. The Saratoga Springs Authority was created by Chapter 208 of the Laws of 1933 and took over the management of the State Reservation (hereinafter more fully described) by lease from the Commission in October, 1933. It was established in order to obtain a loan from the Reconstruction Finance Corporation to aid in the further development of the Saratoga Reservation for public health purposes in accordance with the declaration contained in Chapter 866, Laws of 1930, that the development of the Saratoga Springs Reservation for public health purposes is a policy of the State.

[fol. 17] 5. The defendant Saratoga Springs Commission and the defendant Saratoga Springs Authority during the period June 21, 1932, to May 10, 1934, inclusive, bottled for sale and sold in closed containers certain natural mineral waters and natural spring water at a price in excess of 12½ cents per gallon within the jurisdiction of this Court, to vendees within and without the State of New York.

6. Returns disclosing the amount of tax payable, if due, on the sales made during the period from June 21, 1932, to May 10, 1934, inclusive, were filed by defendants, under

protest, with the Collector of Internal Revenue at Albany, New York. Said returns were filed for the months of June, 1932, to September, 1933, inclusive, by and in the name of the defendant Saratoga Springs Commission, which bottled and sold the said waters during this period, and for the months of October, 1933, to May, 1934 inclusive, by and in the name of the defendant Saratoga Springs Authority, which bottled and sold the said waters during the period last mentioned. Attached to each return was a statement as follows: "This return is filed under protest, and it is claimed by the State that no tax is due, upon the ground that the sale of the waters by the State of New York is the exercise of a governmental function."

7. The taxes in the amounts disclosed by said returns, together with interest and penalties, were assessed by the Commissioner of Internal Revenue in the following amounts on the following assessment lists and notices and demands were issued upon the proper parties for the payment of the said assessments on the following dates:

[fol. 18]

Year Month	Amount	Assessment List	Date of Demand
June 1932	Tax $60 37	Sept. 32 P. 770 L. O.	12/14/32
July 1932	Tax 295 04	Sept. 32 P. 770 L. I.	12/14/32
Aug. 1932	Tax 328 02	Sept. 32 P. 770 L. 2	12/14/32
Sept. 1932	Tax 193 18	Oct. 32 P. 2154 L. O.	12/14/32
	Int. 1 67	P. 2157 L. 5	12/14/32
Oct. 1932	Tax 233 28	Nov. 32 P. 2132 L. O.	12/15/32
Nov. 1932	Tax 176 42	Dec. 32 P. 2132 L. I.	1/18/33
Dec. 1932	Tax 140 23	Jan. 33 P. 2162 L. I.	2/10/33
	Int. 1 87	P. 2174 L. 2	2/10/33
Jan. 1933	Tax 176 06	Feb. 33 P. 2124 L. O.	2/30/33
	Int. 1 76	P. 2129 L. 3	2/20/33
Feb. 1933	Tax 58 48	Mar. 33 P. 2160 L. O.	4/24/33
	Int. 48	P. 2165 L. I.	4/34/33
Mar. 1933	Tax 136 85	Apr. 33 P. 2106—A L. O.	6/1/33
	Int. 1 83	P. 2112 L. 7	6/1/33
Apr. 1933	Tax 169 07	May 33 P. 2128—A L. I.	6/13/33
	Int. 2 25	P. 2133 L. 8	6/13/33
May 1933	Tax 169 07	Jun. 33 P. 2123—A L. O.	1/3/37
	Pen. 42 26		
	Int. 3 38	P. 2132 L. 8.	1/3/37
June 1933	Tax 149 31	July 33 P. 2132—A L. O.	1/3/37
	Int. 1 02	P. 2138 L. 8	1/3/37
July 1933	Tax 240 79	Aug. 33 P. 2135 L. O.	1/3/37
	Int. 3 21	P. 2132 L. 6	1/3/37
Aug. 1933	Tax 310 39	Sept. 33 P. 2117—A L. 5	1/2/37
	Int. 2 58	P. 2124 L. 4	1/3/37
Sept. 1933	Tax 287 78	Nov. 33 P. 2093 L. O.	1/3/37
	Int. 5 37	P. 2098 L. 9	1/3/37
Oct. 1933	Tax 155 46	Dec. 33 P. 2049—A L. O.	1/3/37
	Pen. 38 86		
	Int. 3 41	P. 2092 L. 7	1/3/37

[fol. 19]

Year Month	Amount	Assessment List	Date of Demand
Nov. 1933	Tax 245.01	Dec. 33 P. 2049—A L. 1	1/3/37
	Int. 3.26	P. 2092 L. 8	1/3/37
Dec. 1933	Tax 106.97	Jan. 34 P. 2110 L. O.	1/3/37
	Int. .83	P. 2116 L. 3	1/3/37
Jan. 1934	Tax 102.85	Mar. 34 Sp. P. 2000 L. 8	1/3/37
	Pen. 25.71		
	Int. 1.36		
Feb. 1934	Tax 57.28	Mar. 34 Sp. P. 2000 L. 7	1/3/37
	Int. .19		
Mar. 1934	Tax 150.42	Apr. 34 Sp. P. 2000 L. O.	1/3/37
	Int. .50		
Apr. 1934	Tax 261.14	Jun. 34 Sp. P. 2000 L. O.	1/3/37
	Int. 3.48		
May 1934	Tax 124.34	Jun. 34 Sp. P. 2000 L. O.	1/3/37
	Int. .41		

The assessments for each of the months from June, 1932, to September, 1933, inclusive, were made in the name of the defendant Saratoga Springs Commission, and the assessments for each of the months from October, 1933 to May, 1934, inclusive, were made in the name of the defendant Saratoga Springs Authority. No part of said taxes, interest, and penalties so assessed for which notices and demands have been so issued has been paid.

8. There exist at and in the vicinity of Saratoga Springs, in the State of New York, mineral springs characterized by a supersaturation of carbon dioxide gas, and containing in various quantities and combinations, minerals in solution, the most common of which are salt, soda, calcium, magnesium and iron in the form of chlorides and bicarbonates. These springs so existed and were known and used by the [fol. 20] Indians prior to their first use by the colonial settlers around 1775. From the time of their discovery until the present time, the waters of the various springs have been drunk and used for bathing purposes by large numbers of people. The waters of these springs have a recognized medical value, and are prescribed by physicians both for bathing and internal use.

9. From the year 1900 to the year 1912, a number of the springs was acquired and additional springs were drilled, by private companies engaged in the extraction of the natural carbonic acid gas from the waters for commercial sale. For the purpose of increasing the flow of the springs, pumps were installed by these companies with the result that immediately prior to the year 1911 no water flowed

from any of the previously flowing or spouting springs, the water level had sunk to several hundred feet below the ground and the springs were in danger of total extinction.

10. Commencing in the year 1911, for the purpose of preserving the springs and restoring them, the defendant State of New York, through various agencies, acquired all of the then existing springs, and stopped all pumping of the waters; title to all lands and springs being taken in the name of the State of New York. Title to all lands, springs and other property under the jurisdiction of the said Commission and Authority is and at all times has been in the State of New York. As a result of the measures referred to, the water levels were restored, the springs again flowed, and where permitted by the State, again spouted.

11. In 1929 the Legislature of the State of New York created a commission to investigate and report upon the [fol. 21] proper use of the State-owned springs at Saratoga Springs. Acting upon the report of that commission, the legislature by Chapter 866 of the Laws of 1930, transferred custody of the springs from the State Department of Conservation, which had had jurisdiction over them since 1916, to a newly-created agency known as the Saratoga Springs Commission. Section 1 of the act referred to declares it to be the purpose of the Legislature to develop "the Saratoga Springs Reservation as a state health resort and spa for use by the public for balneological, therapeutic and other similar healthful purposes. The development of such Reservation for public health purposes is hereby declared a policy of the state in accordance with the recommendations of the commission." By Section 4 of Chapter 866 of the Laws of 1930, the Saratoga Springs Commission was also assigned the duties and obligations previously imposed upon the State Conservation Department with reference to the Reservation at Saratoga Springs. These included the following, as stated in Section 602, Chapter 295, Laws of 1916, as amended by Section 40, Chapter 242, Laws of 1928, (New York Conservation Law, Section 653): "The Reservation property, with all the lands, springs, wells, rights and easements included therein shall forever remain and be kept, maintained and used for the purpose of restoring to their natural state and purity and preserving the said springs and wells and natural flow of water and gases therefrom; and of promoting the resort to the said

springs of the people of the state for health, and other suitable uses of the said Reservation by the people, and of identifying, safeguarding and assuring the natural purity, qualities and repute of such water and gases, and for the purpose of providing said waters to the people for drinking, free of charge."

[fol. 22] 12. At the time of the creation of the Saratoga Springs Commission, a part of the waters of the springs was, and for ten years previously had been, bottled and sold by a private corporation operating under a lease from the State of New York. One of the first actions of the Saratoga Springs Commission was to purchase from the private corporation its rights under the lease, which then had approximately 15 years to run. The purchase was effected for a sum considerably less than the anticipated profits to the bottling corporation, which was deriving a profit from its operations, during the 15 years it could legally have continued its control of the springs. Commencing May 1, 1932, the Saratoga Springs Commission took over the bottling and sale of these waters, a modern and efficient bottling works for scientific bottling of the waters having been constructed.

13. Three mineral waters and one plain water are and were during the period covered by the assessments, bottled and sold, all in their natural state. The mineral waters are Hathorn, a laxative water; Coesa, a diuretic water; and Geyser, a digestive water. These are properly classified as mineral waters; they are not suitable for indiscriminate beverage use and cannot be mixed with fruit juices or alcoholic beverages. The plain water, known as State seal, is of high chemical and vegetable purity. It is used very largely in various state institutions and offices, and a small amount is also purchased by the general public, mostly on recommendation of physicians.

14. During the period June 21, 1932, to May 10, 1934, inclusive, the Saratoga Springs Commission and Saratoga Springs Authority, as stated in the returns filed by them and referred to in paragraphs 6 and 7, above, bottled and [fol. 23] sold 216,390½ gallons of the mineral and plain waters described herein in closed containers at more than 12½¢ per gallon. Aggregate receipts from the sale of bottled waters, including a relatively small amount of plain

water sold at less than 12½¢ per gallon, were as follows for the fiscal years 1933 to 1941.:

1932-3	$104,434.98
1933-4	101,675.80
1934-5	102,275.60
1935-6	113,441.86
1936-7	138,021.40
1937-8	144,637.91
1938-9	143,611.57
1939-40	141,927.24
1940-41	135,281.33

All of the bottled waters referred to herein were sold for consumption off the Reservation. Large quantities of the above mineral waters and other mineral waters were and are consumed on the Reservation, free of charge at the springs and at various Drink Pavilions and upon payment of admission fees to the two Drink Halls, hereinafter referred to.

15. From May 1, 1932, to the present time, including the period covered by the assessments involved in this proceeding, sales of the bottled waters have been made through distributors and retailers and by direct shipments to consumers. During the period covered by the assessments the Commission and Authority, respectively, had an exclusive distributor for the Metropolitan area of New York City, including five counties in New Jersey. This distributor handled about 50% of the total waters sold at more than 12½¢ per gallon. Non-exclusive distributors were main- [fol. 24] tained in Boston, Massachusetts, Western Massachusetts, Albany, Schenectady, Troy, Buffalo, Philadelphia, Pennsylvania, Baltimore, Maryland, Washington, D. C., Chicago, Illinois and other places. This situation obtains at the present time except that the dealers in Philadelphia and Chicago have now been granted exclusive rights to the sale of the waters in their respective areas, and an exclusive dealer has been added in Miami, Florida. At all times, the dealers granted exclusive sales rights have undertaken to dispose of a fixed minimum quantity of the waters, and to do certain advertising and promotional work.

16. Advertising of the bottled waters has also been conducted during each year by the Commission and Authority,

respectively and has included space in newspapers and medical periodicals, distribution of free samples, window and counter displays and circularization. The total amounts charged to such advertising, not including advertising for the baths and other facilities, were as follows for the fiscal years 1933-41:

1932-3	$ 29,607.98
1933-4	18,392.62
1934-5	13,187.43
1935-6	3,596.06*
1936-7	24,685.39
1937-8	27,629.22
1938-9	30,925.38
1939-40	14,578.59
1940-41	17,750.89

NOTE (*) In the year 1935-6 the cost of "Free Bottled Waters" only was charged to Waters Department advertising. The total of all advertising expense for that year amounted to $72,205.92.

[fol. 25] 17. The annual report of the Commission and Authority for the year 1935-1936 contains the following paragraphs relating to publicity and advertising for both the sale of bottled waters and the services rendered at the Reservation (customarily referred to as the Saratoga Spa):

> The greatest present need is means for promotion of the Spa, not alone advertising in the customary commercial sense, but in other ways telling New Yorkers what their State has done at Saratoga to make its curative waters available for sufferers from chronic diseases. During the past five years it has been possible to spend for promotion only $150,651.17, an average of $30,130.23 per year. A comparatively small part only of this sum has been spent for advertising; all charges, whether in goods or in service that have to do with promotion being entered under this heading. It has been a wholly inadequate amount, as may be shown by comparison with the expenditures of other institutions in comparable fields.
>
> White Rock spends $400,000 a year. French [redacted] Springs spends on Pluto Water and the hotel $300,000

a year. The Greenbrier, at White Sulphur Springs, West Virginia, spent $44,215 last year, and the Homestead at Virginia Hot Springs, $30,000. One hotel at Hot Springs, Arkansas, The Arlington, spent $20,000 in advertising its baths. The Bernard McFadden "health" hotel at Dansville, N. Y., spent $90,491 last year. Foreign waters and products spend similar sums in our own market. Carlsbad products spent $80,285 last year over the radio alone in promoting the salts derived from the Czecho-Slovakian waters, with an additional $4,875 in magazine advertising. Vichy Celestin Water spent $25,000 in New York City alone.

[fol. 26] It must be borne in mind that expenditures at Saratoga have been for the Spa and its waters both, in spite of the fact that they are distinct and should be promoted individually; the Spa offering services and waters being a product. • • •

18. It has been the consistent policy of the Saratoga Springs Commission and the Saratoga Springs Authority steadily to increase the volume of waters bottled and sold and to derive the largest profit possible from this activity, in order that the proceeds might be applied to the cost of other services rendered at the Spa. In this connection, the annual report for the fiscal year 1935-36, referred to, contains the following excerpts:

We are reminded that in 1932 something happened which now threatens to change the character of the Saratoga Spa. The Legislature ceased its appropriations for a development it had authorized and for which it was expected to furnish the necessary funds. The buildings authorized were then less than half completed. In place of further appropriations the Legislature created the Saratoga Springs Authority and gave it permission to borrow from the Federal government sufficient money to finish the work. The Saratoga Springs Authority thus became responsible for repayment of a loan of $3,200,000 with interest; hence, the necessity to operate the Spa along lines yielding a profit.

Heretofore free treatments for needy and ailing citizens have been encouraged and in general the policy at

Saratoga has been to serve the public at or below cost. As a matter of fact, the number of free treatments given has grown and promises to grow as the benefits [fol. 27] of the waters become more widely known. In addition the public use of the enlarged park area is rapidly increasing the cost of its care. Also the Commission is obliged to maintain at the springs themselves a free service, for whoever may come there to drink or fill their bottles or jars. It is a conservatively estimated that this free service is enjoyed by as least 200,000 persons during the year. Another 20,000 persons—men, women and children—visit Geyser Park for recreation and picnics.

Under these circumstances the Commission seems faced with the necessity of limiting the free public function of the Spa or asking the Legislature to appropriate funds to cover the annual payments to the R. F. C. until such time as the increase of water sales turns in a sufficient profit.

The Commission fully believes that the sale of bottled waters, if properly advertised as any private corporation would advertise them, will *in the end* make such a profit and enable it to continue the policy of furnishing certain of the facilities of the Spa to the people of the State of New York free, and others at cost. Those increased water sales and profits, however, are necessarily slow of realization.

19. During the fiscal years 1933 to 1941, the following profits or losses were derived from the sales of the bottled waters, computed without depreciation or other capital charges:

1932-3	$15,368.97
1933-4	8,662.36
1934-5	12,062.79
[fol. 28] 1935-6	20,026.72
1936-7	17,050.55
1937-8	16,165.98
1938-9	7,358.24
1939-40	27,022.54
1940-41	23,249.84

All of the profits so derived, as shown by the above table, were devoted to the current expenses of other parts of the Reservation.

20. None of the watering places or spas referred to in the second paragraph of the excerpt quoted in paragraph 17 above, which are located in the United States, is owned or operated by the federal government or by any state, state commission or authority, or political subdivision. While several of these spas, as indicated, bottle and sell mineral waters to the general public, in no instance are such operations conducted by the federal government, or by any state, state commission or authority or political subdivision. The parties know of no other instance in the United States where a state, state commission or authority, or political subdivision owns and operates or either owns or operates a spa comparable in any respect to the Saratoga Spa, or of any instance where a state, state commission or authority, or political subdivision bottles or sells or either bottles or sells mineral or plain waters. The parties, likewise, know of no instance where the federal government engages in a similar activity.

21. The total available flow of the Geyser, Coesa and Hathorn No. 2 springs, from which the bottled waters are produced, is so great that the quantities of such waters consumed on the premises and the quantities bottled and [fol. 29] sold could be increased many times without injury to these or the other springs on the reservation and without deterioration of the quality of the waters.

22. Pursuant to legislative authorization, the Saratoga Springs Commission and Saratoga Springs Authority have constructed a Drink Hall, called "The Hall of Springs", Roosevelt Bath Houses Nos. 1 and 2, for administering mineral baths, an Administration and Research Laboratory Building, which includes a small theatre, a Bottling Works (referred to in paragraph 12, above), a Recreation Center, with swimming pool, golf course, outdoor gymnasium, tennis courts, and other facilities for outdoor recreation; and a building known as the Gideon Putnam Hotel-Sanitarium; and have remodeled a second Drink Hall, located in the downtown business section of Saratoga Springs. The foregoing buildings and facilities, as well as two older bath

houses, known as the Washington and Lincoln Bath Houses, and certain Drink Pavilions are located upon and are administered as a part of the State-owned Reservation or Spa. All of these buildings and facilities, except the Gideon Putnam Hotel-Sanitarium, and the theatre, were operated by the Saratoga Springs Commission during the period June, 1932, to September, 1933, inclusive, and since September, 1933, have been operated by the Saratoga Springs Authority. The Saratoga Springs Authority also operates a bus line from the City of Saratoga Springs to the Lincoln and Washington Baths, and to the Hall of Springs, Roosevelt Baths, etc., which are located about two miles south of the downtown section of Saratoga Springs. The Gideon Putnam Hotel-Sanitarium has been leased since its construction in 1933 for private operation on a [fol. 30] year-around basis and the theater was and is leased for private operation during the summer months.

23. All of the lands of the Reservation have been purchased and all improvements erected or purchased by virtue of (1) appropriations made by the Legislature of the State of New York in an aggregate amount, as of June 30, 1941, of approximately $5,620,500., and (2) a loan made by the Reconstruction Finance Corporation to the Saratoga Springs Authority in the amount of $3,200,000. It has been necessary for the Legislature of the State of New York to appropriate annually substantial sums for current operations and interest payments, in addition to the gross receipts of the Saratoga Springs Commission and Saratoga Springs Authority, respectively, which have been and are used to defray such expenses. The total annual operating receipts of the Commission and Authority have never been sufficient to meet annual expenses, exclusive of interest and amortization charges on the R. F. C. loan referred to.

24. The facilities of the Reservation are available to citizens of New York State and to the public generally on equal terms. Fees or admission prices are charged for admission to the two Drink Halls, the Bath Houses, the Recreation Center and the summer theater, except that a substantial number of charity treatments are also administered at the Bath Houses. The number of such charity treatments and their ratio to paid treatments are given in the following table, set forth in the annual report of the Saratoga Springs Commission and Saratoga Springs Authority for the fiscal year 1939-1940:

[fol. 31]

Fiscal Year	Paid Treatments	Charity Treatments	Total Treatments
1930-31	92,176	No record	92,176
1931-32	85,267	11,811	97,078
1932-33	66,343	18,755	85,098
1933-34	78,530	28,871	107,401
1934-35	81,870	15,000	98,870
1935-36	101,496	17,490	118,986
1936-37	128,334	19,217	147,551
1937-38	117,340	19,359	136,698
1938-39	111,211	24,971	136,182
1939-40	111,460	23,245	134,705
1940-41 (6 mos.)	84,708	20,041	94,749

In addition, fares are charged for transportation on the bus line. Receipts from admissions to the Bath Houses and from sales of the bottled waters have at all times constituted the two largest items of income, excepting the items of appropriations by the State Legislature to the Saratoga Springs Commission and Saratoga Springs Authority. The largest item of net income, however, has accrued from the lease of the Gideon Putnam Hotel Sanitarium.

25. All moneys of the Saratoga Commission are deposited and disbursed in accordance with Section 11 of Ch. 866 Laws of 1930.

All moneys of the Saratoga Authority are paid to the Commissioner of Taxation & Finance of the State of New York as agent of the Saratoga Springs Authority and disbursed in accordance with Section 4 of Ch. 208 L. 1933.

26. Chapter 569 Laws 1909; Chapter 394 Laws 1911, Chapter 252 Laws 1914; Chapter 866 Laws 1930; Chapter [fol. 32] 279 Laws of 1937; Chapter 208 Laws 1933 and Article XV entitled "Division of Saratoga Springs Reservation" of the Conservation Law of the State of New York are hereby referred to and made a part of this stipulation.

Executed this 6th day of October, 1941.

United States of America, by Ralph L. Emmons, United States Attorney. State of New York, by John J. Bennett, Jr., Attorney-General. Saratoga Springs Commission, Saratoga Springs Authority, by Denis J. Harrington, Their Attorney.

IN UNITED STATES DISTRICT COURT

OPINION OF BRYANT, DISTRICT JUDGE—November 17, 1942

Appearances:

Ralph L. Emmons, Esq., United States Attorney, (B. F. Tompkins, Esq., Assistant United States Attorney, Samuel O. Clark, Jr., Esq., Assistant Attorney General, Andrew D. Sharpe, Esq., and Alvin J. Rockwell, Esq., Special Assistants to the Attorney General, of Counsel,) for the plaintiff.

Hon. John J. Bennett, Jr., Attorney General of the State of New York, (Henry Epstein, Esq., Milton Kaplan, Esq., Jack Goodman, Esq., of Counsel,) for the State of New York.

[fol. 33] Messrs. Schwarte, Slade, Harrington & Goldsmith, Attorneys (John A. Slade, Esq., and Denis J. Harrington, Esq., of Counsel,) for Saratoga Springs Commission and Saratoga Springs Authority.

BRYANT, *D. J.*:

This is a suit for the collection of taxes, penalties and interest in the amount of $4,473.50, and additional interest from various dates between December 14, 1932, and January 3, 1937, inclusive, accruing under section 615 (a)(5) of the Revenue Act of 1932.

The question at issue is whether, in bottling for sale and selling certain mineral and table water, the State of New York and its agencies, Saratoga Springs Commission and Saratoga Springs Authority, are immune under the Federal Constitution from the taxes imposed by said Revenue Act. This Act imposed upon all natural or artificial mineral or table water "sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 12½ cents per gallon, a tax of two cents per gallon."

There exists at and in the vicinity of Saratoga Springs, New York, mineral springs having a recognized medicinal value, the waters of which are prescribed by physicians both for bathing and internal use. Ever since Indian days these waters have been drunk and used for bathing purposes by vast numbers of people. Prior to the year 1912, a number of the springs had been acquired, and additional springs had been drilled, by private companies engaged

in the extraction of the natural carbonic acid gas from the waters for commercial use. In order to increase the flow of these springs, pumps had been installed. As a result of this usage, immediately prior to the year 1911, no water [fol. 34] flowed from any of the previous flowing or spouting springs; the water level had shrunk several hundred feet below the surface of the ground and the springs were in danger of total extinction. Commencing in the year 1911, the State of New York, for the purpose of restoring the springs and preserving the waters for the benefit of the people of the State and the public generally, acquired all of the then existing springs. Title to all of the lands were taken in the name of the State. These lands, and the facilities located upon them, are usually referred to as the "Saratoga Reservation."

After acquisition by the State and prior to 1930, a private corporation, operating under a lease from the State, bottled and sold mineral and table water taken from the springs.

Defendant Saratoga Springs Commission was created by Chapter 866 of the New York Laws of 1930 as a temporary commission for the term of seven years and was continued as a permanent commission in the State Conservation Department by Chapter 279 of the Laws of 1937. It is a public agency of the State of New York. Its activities and liabilities were and are those of the State. It cannot sue nor be sued in its own name. In 1930, soon after creation, it took over the custody and control of the Reservation. One of its first acts was the purchase of the private corporation's lease and its rights to bottle and sell waters. With money appropriated by the State, the Commission built a modern and efficient bottling works and on May 1st., 1932, took over the bottling and sale of the waters. It continued this activity until 1933.

In 1933, Saratoga Springs Authority came into existence under Chapter 208 of the New York Laws of 1933. It is [fol. 35] an agency of the State of New York, a public benefit corporation with its powers, duties and purposes prescribed by law. It may sue and be sued in its own name without joining the State. In 1933, soon after creation, it took over the custody, control and operation of the Reservation. Since that time, among other things, it has carried on the business of bottling and selling mineral and spring water.

The State of New York has expended, in the purchase of lands and the improvements erected thereon, in addition to $3,200,000 received as a loan from the Reconstruction Finance Corporation, approximately $5,620,500. With moneys appropriated and borrowed as above stated, the Commission and the Authority, pursuant to authorization of the New York Legislature, have constructed a drink hall, two bath houses for administering mineral baths, an Administration and Research Laboratory building which includes a small theatre, a bottling works (referred to above), a recreation center with swimming pool, golf course, outdoor gymnasium, tennis courts and other facilities for outdoor recreation and a Hotel-Sanitarium. They have also remodelled a second drink hall located in the downtown business section of the City. The foregoing buildings and facilities, as well as two older bath houses and certain drink pavilions on the premises at the time of purchase, are located upon and are administered as a part of the Reservation. All of these buildings, except the hotel-sanitarium and the theatre, were operated by the Saratoga Springs Commission during the period June, 1932, to September, 1933, inclusive, and, since the latter date, have been operated by the Saratoga Springs Authority. The Authority also operates a bus line from the City of Saratoga to the baths and springs on the Reservation. The [fol. 36] Hotel-Sanitarium has been leased, since its construction in 1935, for private operation on a year around basis and the theatre is and was leased for private operation during the summer months.

The facilities of the Reservation have at all times been available to citizens of New York State and to the public generally on equal terms. Fees are charged for admission to the two drink halls, the bath houses, the recreation center and the summer theatre, although a substantial number of charity treatments are also administered at the bath houses. In addition fares are charged for transportation on the bus line. All receipts, including the income from the lease of the hotel-sanitarium and receipts from sales of the bottled water, are used in the maintenance and upkeep of the Reservation. The gross receipts have never been sufficient to meet annual expenses, exclusive of interest and amortization charges on the loan. Annually, the Legislature of the State of New York has appropriated

substantial sums for current operations, interest charges and amortization payments.

The gross sales of bottled water amount to approximately $125,000.00 per year. The Commission and the Authority have expended something above an average of $20,000.00 per year for advertising of the bottled water. It has been, and is, the consistent policy of the Commission and the Authority steadily to increase the volume of water bottled and sold and to derive the largest profit possible from the operation. The larger the sales and the greater the profits the less deficiency there will be for the State to meet annually. [fol. 37] Upon demand the Commission and the Authority, under protest, filed with the Collector of Internal Revenue at Albany the amount of mineral and plain water bottled and sold during the period in question. The reports showed 216,890½ gallons. On the basis of these returns, taxes, penalties and interest were assessed in amounts above stated and demand for payments were made. No part of these amounts of the interest accruing thereon has been paid.

Discussion of tax immunity by virtue of the necessary implications of our dual system of government stems from McCulloch v. Maryland (4 Wheat. 316) which was the basis fifty years later of the decision in Collector v. Day (11 Wall. 113). In view of later decisions, and the review the cited decisions have had therein, consideration of these cases seems unnecessary. Plaintiff finds particular comfort, if not the whole support for its position, in Helvering v. Gerhardt, 304 U. S. 405, and the three pertinent earlier cases, which in that opinion won the express approval of the Court (South Carolina v. United States, 199 U. S. 437; Ohio v. Helvering, 292 U. S. 360; Helvering v. Powers, 293 U. S. 214), and in Allen v. Regents, 304 U. S. 439. The facts in these cases differ so materially from the facts in the case at bar that they cannot be considered direct precedents. However, the rules therein established must be followed. One is that "the immunity implied from the dual sovereignty recognized by the Constitution does not extend to business enterprises conducted by the States for gain" (Allen v. Regents, *supra*, p. 453).

Defendants argue strenuously that they are not conducting business for gain. It is their well supported contention [fol. 38] that the State of New York is engaged in a broad

program of conservation of natural resources, promotion of health and creation of recreation facilities of which the sale of bottled water is only a small part. Their argument seems to be answered by the Regents case. The State of Georgia was engaged in a governmental function, the carrying out of a program of public education. The holding of athletic contests was a fractional part of that program and yet those contests were not considered mere incidents, in the governmental program. There are marked differences of facts in the two cases. In the Regents case the tax was paid by the public. Refusal of immunity placed no burden upon the State. At most it prevented increased enrichment. Here the tax, if allowed, is a direct burden on the State. Its payment will reduce directly the revenues of the State. However, in view of the Regent case and Helvering v. Gerhardt, *supra*, it cannot be said that the business, as carried on, is free from the burden of a non-discriminating tax laid on sales.

Defendants further contend that the State of New York is engaged only in the sale of its natural resources: that under our system of dual sovereignty the United States cannot tax those resources nor the proceeds received from their sale. With the last proposition I am in accord, but I cannot accept the proposition that the State was only selling its natural resources. It took its natural resources and, through a bottling process, put those resources into a preserved condition where they could be sold to the public in competition with private waters. The bottling and sale of the waters was a business enterprise conducted for gain rather than simply a sale of the State's natural resources. Allen v. Regents, *supra*, applies.

[fol. 39] Plaintiff is entitled to judgment. For the period, June 21, 1932, to September 1933, inclusive, the waters were bottled and sold by the Saratoga Springs Commission. For the liability arising during that period, plaintiff may have judgment against the Saratoga Springs Commission and the State of New York jointly. For the liability arising during the period October, 1933, to May 10, 1934, plaintiff is entitled to judgment against the Saratoga Springs Authority.

Dated: November 17th, 1942.

Frederick H. Bryant, United States District Judge

IN UNITED STATES DISTRICT COURT

Decision—May 10, 1943

The above entitled action having been brought on for trial before this Court without a jury at a term thereof in Syracuse, New York, on the 2d day of April, 1942, upon the stipulation of facts made by the parties and filed herein, and that after hearing the evidence herein and arguments of respective counsel and consideration of the briefs filed, the Court makes the following

FINDINGS OF FACT

1. The Court finds the detailed facts in accordance with the written stipulation of the parties filed in this proceeding, to which reference is hereby made.

[fol. 40] 2. As an ultimate fact, the Court finds that in bottling for sale and selling mineral and table waters derived from the State-owned reservation at Saratoga Springs during the period June 21, 1932, to May 10, 1934, inclusive, the State of New York and its agencies, Saratoga Springs Commission and Saratoga Springs Authority embarked in a business which would normally be taxable. The activity so conducted by the State of New York and its agencies had the characteristics of a business enterprise and the waters referred to were sold in competition with private waters.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter here involved.

2. Section 615 (a) (5) of the Revenue Act of 1932 is applicable to the bottling for sale and selling of natural or artificial mineral waters or table waters when that activity is conducted by a state or its agencies.

3. No immunity from federal taxation attaches to the action of a state or its agencies in bottling for sale and selling natural or artificial mineral waters or table waters by virtue of the provisions, structure or implications of the Federal Constitution.

4. For the period June 21, 1932, to September, 1933, inclusive, plaintiff is entitled to judgment against the State

of New York and the Saratoga Springs Commission, jointly, for the taxes, penalties and interest here involved. For the period October, 1933, to May 10, 1934, inclusive, plaintiff is entitled to judgment against the Saratoga Springs Authority for the taxes, penalties and interest here involved.

[fol. 41] Judgment in accordance herewith, with costs against the State of New York and Saratoga Springs Commission, may be entered herein.

Dated: May 10, 1943.

Frederick H. Bryant, United States District Judge.

In United States District Court

Judgment—May 10, 1943

The above entitled action being at issue in this Court and brought on for trial before the Court without a jury at a term of said Court held at Syracuse, N. Y. April 3, 1942, and Ralph L. Emmons, United States Attorney for the Northern District of New York, and Alvin J. Rockwell, Attorney, U. S. Department of Justice, and B. F. Tompkins, Assistant United States Attorney, appearing for the plaintiff, and John J. Bennett, Jr. Attorney General of the State of New York, Milton J. Kaplan and Jack Goodman, Assistant Attorneys General, John A. Slade and Denis J. Harrington appearing for the defendants, Saratoga Springs Commission and Saratoga Springs Authority; and the Court having considered the arguments and briefs of counsel and the evidence and stipulation of parties filed herein, and having made and filed its findings of fact and conclusions of law thereon,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff have and recover of the defendants, the State of New York, and Saratoga Springs Commission, jointly, [fol. 42] the sum of Five Thousand Four Hundred Fifty-four Dollars and Seventy-seven Cents ($5,454,77) with interest at 52 cents per day from December 31, 1942 on $3,124.34, the tax, to date of entry hereof, and the further sum of $28.86, the costs and expenses of the plaintiff hereby taxed and allowed; and the plaintiff have and recover from the defendant, the Saratoga Springs Commission the sum of Two Thousand Eight Dollars and Forty-four Cents ($2,008.44) with interest on the tax of $1203.47 at 20 cents

per day from December 31, 1942 to date of entry of this judgment.

And that execution issue therefor.

Dated: May 10, 1943.

Frederick H. Bryant, United States District Judge.

IN UNITED STATES DISTRICT COURT

AMENDED JUDGMENT—June 1, 1943

The above entitled action being at issue in this Court and brought on for trial before the Court without a jury at a term of said Court held at Syracuse, N. Y. April 3, 1942, and Ralph L. Emmons, United States Attorney for the Northern District of New York, and Alvin J. Rockwell, Attorney, U. S. Department of Justice, and B. F. Tompkins, Assistant United States Attorney, appearing for the plaintiff, and John J. Bennett, Jr. Attorney General of the State of New York, Milton J. Kaplan and Jack Goodman, Assistant Attorneys General, John A. Slade and [fol. 42] Denis J. Harrington appearing for the defendants, Saratoga Springs Commission and Saratoga Springs Authority; and the Court having considered the agreements and briefs of counsel and the evidence and stipulation of parties filed herein, and having made and filed its findings of fact and conclusions of law thereon,

It is hereby ordered, adjudged and decreed that the plaintiff have and recover of the defendants, the State of New York, and Saratoga Springs Commission, jointly, the sum of Five Thousand Four Hundred Fifty-Four Dollars and Seventy-Seven Cents ($5,454.77) with interest at 51 cents per day from December 31, 1942 on $3,124.34, the tax, to date of entry hereof, and the further sum of $28.86, the costs and expenses of the plaintiff hereby taxed and allowed; and the plaintiff have and recover from the defendant, the Saratoga Springs Authority the sum of Two Thousand Eight Dollars and Forty-Four Cents ($2,008.44) with interest on the tax of $1203.47 at 20 cents per day from December 31, 1942 to date of entry of this judgment.

And that execution issue therefor.

The foregoing judgment is in amendment of and supersedes the judgment herein entered on May 12, 1943, and is made on stipulation of the parties interested herein.

Dated: June 1, 1943.

Frederick H. Bryant, United States District Judge.

[fol. 44] IN UNITED STATES DISTRICT COURT

STIPULATION RE JUDGMENT—June 12, 1943

It is hereby stipulated and agreed by the plaintiff that the amended judgment herein, dated May 10, 1943, and entered June 3, 1943, in which it is recited that said amended or superseding judgment "is made on stipulation of the parties interested herein" refers only to the change in the name of "Saratoga Springs Commission" to "Saratoga Springs Authority", and is not deemed or intended as meaning a consent by the defendants to entry of judgment, or to a consent judgment herein, and no such contention will be made by the plaintiff herein.

Dated: June 12, 1943.

(Sgd.) Irving J. Higbee, United States Attorney, Attorney for the Plaintiff.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL OF STATE OF NEW YORK—August 3, 1943

[Title omitted]

Notice is hereby given that the State of New York, one of the defendants above named, hereby appeals to the [fol. 45] Circuit Court of Appeals for the Second Circuit from so much of the judgment herein entered with the Clerk of the United States District Court for the Northern District of New York, at Utica, New York, in this action on May 12, 1943, and from so much of the amended judgment herein entered with said Clerk in this action on June 3, 1943, as adjudges that the plaintiff have and recover of the defendants, the State of New York and Saratoga Springs Commission, jointly, the sum of Five Thousand Four Hundred Fifty-Four Dollars and Seventy-Seven Cents ($5,454.77), with interest at 51 cents per day from December 31, 1942 on $3,124.54, the tax, to date of entry, and the further sum of $28.86, the costs and expenses of the plaintiff.

Dated August 3, 1943.

Nathaniel L. Goldstein, Attorney-General of the State of New York, Attorney for Defendant State of New York, 216 State Capitol Building, Albany, N. Y.

To The Clerk of the United States District Court for the Northern District of New York and to Irving J. Higbee, Esq., United States Attorney.

[fol. 46] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL OF DEFENDANTS, COMMISSION AND AUTHORITY—July 20, 1943

[Title omitted]

Notice is hereby given that Saratoga Springs Commission, one of the defendants above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from so much of the judgment herein entered with the Clerk of the United States District Court for the Northern District of New York, at Utica, New York, in this action on May 12, 1943, and from so much of the amended judgment entered with said Clerk in this action on June 3, 1943, and from each and every part thereof, as adjudges that the plaintiff have and recover of the defendants the State of New York and Saratoga Springs Commission jointly the sum of Five Thousand Four Hundred Fifty-Four Dollars and Seventy-Seven Cents ($5,454.77), with interest at 51 cents per day from December 31, 1942, on $3,124.34, the tax to date of entry, and the further sum of $28.86, the costs and expenses of the plaintiff, and further

Notice is hereby given that Saratoga Springs Authority, one of the defendants above named, hereby appeals to [fol. 47] the Circuit Court of Appeals for the Second Circuit from so much of said judgment and said amended judgment herein, and from each and every part thereof, as adjudges that the plaintiff also have and recover of the defendant Saratoga Springs Authority the sum of Two Thousand Eight Dollars and Forty-Four Cents ($2,008.44), with interest on the tax of $1,203.47 at 29 cents per day from December 31, 1942, to date of entry.

Dated July 20, 1943.

Denis J. Harrington, Attorney for Defendants, Saratoga Springs Commission and Saratoga Springs Authority, Appellants, 398 Broadway, Saratoga Springs, N. Y.

To The Clerk of the United States District Court, Northern District of New York and to Irving J. Higbee, United States Attorney.

In United States District Court

Stipulation of Record—September 1, 1943

It is hereby stipulated that the foregoing printed record contains a full, true and correct record of the pleadings [fol. 48] and stipulation necessary for the determination of the appeal herein, including the opinion or decision of the United States District Judge filed herein, and that the Clerk of the U. S. District Court for the Northern District of New York shall make return thereof and file the same with the United States Circuit Court of Appeals for the Second Circuit without further comparison as and for a complete and true transcript of the record on the appeal in said cause.

Dated September 1, 1943.

Irving J. Higbee, United States Attorney, Attorney for Plaintiff-Appellee. Nathaniel L. Goldstein, Attorney General, Attorney for Defendant, State of New York, Appellant. Denis J. Harrington, Attorney for Defendants, Saratoga Springs Commission, and Saratoga Springs Authority, Appellants.

[fols. 49-58] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 50] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1943

No. 124

(Argued December 16, 1943 Decided February 7, 1944)

UNITED STATES OF AMERICA, Plaintiff-Appellee,

against

STATE OF NEW YORK and SARATOGA SPRINGS COMMISSION and SARATOGA SPRINGS AUTHORITY, Defendants-Appellants

Before:

L. Hand, Chase and Frank, Circuit Judges

Appeal by the defendants from a judgment of the District Court for the Northern District of New York in a suit brought by the United States to recover excise taxes. Affirmed.

[fol. 51] Samuel O. Clark, Jr., Assistant Attorney General; Sewall Key, J. Louis Monarch, Paul R. Russell, Special Assistants to the Attorney General; Irving Higbee, United States Attorney; B. F. Tompkins, Assistant United States Attorney for Plaintiff-Appellee.

Nathaniel L. Goldstein, Attorney General of The State of New York, Attorney for Defendant-Appellant; Orrin G. Judd, Solicitor General; Wendell P. Brown, First Assistant Attorney General; Henry S. Manley, Assistant Attorney General, Of Counsel.

Denis J. Harrington, Attorney for Saratoga Springs Commission and Saratoga Springs Authority; John A. Slade, of Counsel.

CHASE, *Circuit Judge:*

This appeal is from a judgment for the plaintiff entered in the District Court for the Northern District of New York in a suit by the United States to recover taxes, with interest thereon, levied against the three defendants under §615 (a) (5) of the Revenue Act of 1932, c. 209, 47 Stat. 169 on sales of bottled mineral and table waters taken from the springs at the State Reservation in Saratoga, N. Y. The defense was that the Saratoga Springs Authority is immune from such taxation as an agency of the state of New York engaged

in the performance of a governmental function of a nontaxable character.

The facts which were stipulated may be summarized as follows: From colonial times the waters found at Saratoga Springs have been recognized to possess marked medicinal value by virtue of the presence of various minerals, and they have been extensively used for drinking and bathing [fol. 52] purposes. The springs were exploited by private enterprise until 1912, but unwise operation was taking its toll by lowering the water level to an alarming extent and in that year the state stepped in to prevent that. To preserve and to restore them to their former flow, the state acquired title to all the land on which the springs were located, and took immediate measures to return the subterranean water level to a height from which it had been lowered by the drilling of new wells while the business was privately conducted.

In 1916 the State Department of Conservation was given custody of the lands, but in 1930 control was put in a newly-created Saratoga Springs Commission, a public commission of the State of New York and one of the defendants in this case. In 1933 the Saratoga Springs Authority, a public benefit corporation of the State of New York, took over the management and control of the premises by lease from the Commission. Large sums have been spent upon the improvement and maintenance of the springs, which are operated and made available to the people of New York and others, for the purpose of spreading widely the healthful benefits to be derived from the use of such waters.

To that end the Authority maintains on the premises a variety of establishments for the better utilization of the natural resources found in the springs. There are bath houses, tennis courts, drink halls, and a recreational center. Bus service is provided, and there is a hotel sanitarium operated by others under lease from the Authority.

The sale of bottled waters is promoted by extensive and costly advertising, and in recent years this enterprise has always yielded a substantial profit, with the exception of one year when a loss was sustained. The profits realized are applied to the expenses of maintaining the Reservation, which is not self-supporting and requires for its continued existence the aid of a large annual appropriation from the state legislature to pay the current deficits and to meet the

[fol. 53] interest and principal payments upon outstanding indebtedness.

The contention of the defendants is that the nature of this enterprise indicates that its operation is a governmental function of the State of New York immune from taxation.

The levy which is the subject of this litigation is a tax of two cents per gallon laid upon the sale of bottled waters sold at more than 12½ cents per gallon. The district court held that the sales were not made in performing a non-taxable governmental function, and entered judgment for the United States. 48 F. Supp. 15.

The Supreme Court held in *Collector* v. *Day*, 11 Wall. 113, that state governments were entitled to immunity by constitutional implication from taxation by the nation of the exercise of functions which were essential to their existence as they were constituted when the Constitution was adopted and on the premise that salaries are exempt when paid by a state to its officers who perform functions which are themselves immune from federal taxation invalidated a tax upon the salary of a state probate judge. But this case has recently been disapproved if not altogether overruled. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466. And it is clear that where a state engages in business in competition with private enterprise it enjoys no special privilege so far as immunity from federal taxation is concerned. *South Carolina* v. *United States*, 199 U. S. 437. But exactly where the line is to be drawn remains a problem by no means easy to solve and a variety of tests have been proposed from time to time.

In the *South Carolina* case, *supra*, the Supreme Court decided that immunity attached to activities of a strictly governmental character. In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172, the line was drawn at essential governmental functions. *Helvering* v. *Powers*, 293 U. S. 214, 225, spoke of usual governmental functions. The touchstone was held [fol. 54] to be traditional activities in *United States* v. *California*, 297 U. S. 175, 185. And in *Allen* v. *Regents*, 304 U. S. 439, 451, the court said it was a question whether the activity corresponded in all its essentials to a business usually carried on by private enterprise.

It will be noted that all those tests are more or less similar, yet they are not different ways of expressing quite the same idea. We think the fundamental consideration must be that exemption from federal taxation in a particular case flows

from the necessity to protect the continued existence of a state. *Cf. Helvering* v. *Gerhardt*, 304 U. S. 405, 421. The need of the state activity to maintain the states as they exist in our system of dual sovereignty will loom as the paramount issue, and whether any activity is described as essential or usual or traditional or something else will not weigh very heavily except as it bears upon that.

Turning now to the precise question here presented we are unable to distinguish as a permissible subject of federal taxation the business of a state engaged in bottling and selling water, a common private enterprise, from the business of a state engaged in selling some other potable like intoxicating liquor, also a common private enterprise. As the last mentioned activity is undoubtedly taxable by the federal government, *South Carolina* v. *United States, supra; Ohio* v. *Helvering*, 292 U. S. 360, so is the first. Much is made by defendants of the great value to public health, which is afforded by the springs, and we heartily agree that the enterprise is an extremely worthy one which benefits in great measure the people of New York as well as those from other states who visit the reservation. But it is not the maintenance of the health resort which is taxed. Nor does it seem possible to make a sound distinction between this case and those just cited on the ground that this water so bottled and sold is from a surplus resulting from the conservation and maintenance of a natural resource. It cannot [fol. 55] be denied that it is the limitation of the amount of water taken from the springs which preserves them for present and future use; not whether water withdrawn is bottled in part and sold. Equally immaterial to the same subject is whether the bottling and selling, if done, is done by a state agency or privately as formerly. Except for the profit the state derives from the business, all that it accomplishes in the conservation of a natural resource and in making the spring water available to the public could be done without making any charge for bottled water. When it engages in selling the bottled water the Saratoga Springs Authority is engaged in business for profit in competition with others in like business and subject to like federal taxation.

It is argued that *Mayo* v. *United States*, 319 U. S. 441, is contrary but we can perceive no conflict with the principles here given effect. In the *Mayo* case the issue was whether a Florida statute imposing an inspection fee designed to main-

tain the desired quality of fertilizer used on land in that state could be enforced in respect to shipments of fertilizer into Florida to be distributed under the supervision of the Secretary of Agriculture in carrying out the provisions of the Soil Conservation and Domestic Allotment Act, 49 Stat. 163, 1148; 50 Stat. 329; 55 Stat. 257, 860; 56 Stat. 664. It was held that, as in so doing the United States was carrying out a governmental function upon which the inspection fee was a direct burden, it was a tax which could not be laid by a state in the absence of consent by Congress, a quite different issue from that presented here. For any lawful function of the federal government in the performance of which the United States acts directly is constitutionally immune from state taxation, unless Congress consents, whereas only a limited class of state activities are constitutionally immune from federal taxation.

Judgment affirmed.

[fol. 56] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the 23rd day of February, one thousand nine hundred and forty-four.

Present: Hon. Learned Hand, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

STATE OF NEW YORK and SARATOGA SPRINGS COMMISSION and SARATOGA SPRINGS AUTHORITY, Defendants-Appellants

Appeal from the District Court of the United States for the Northern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 57] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States of America, v. State of New York and Saratoga Springs Commission and Saratoga Springs Authority. Order for Mandate. United States Circuit Court of Appeals: Second Circuit. Filed Feb. 23, 1944. Alexander M. Bell, Clerk.

[fol. 58] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 59] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 83

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed June 12, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 48,489, U. S. Circuit Court of Appeals, Second Circuit, Term No. 83. State of New York and Saratoga Springs Commission and Saratoga Springs Authority, Petitioners, *vs.* The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed May 12, 1944. Term No. 83, O. T. 1944.